

## CHAPTER 6

### AGENCY HEARING PROCEDURES

#### 1-6-1 Presiding Officer.

(a) In all Agency Hearings before the Commission, the Chair, or one of the Commissioners, or a Hearing Officer duly appointed and designated shall preside at the hearing.

(b) The Presiding Officer shall control the course of hearings, administer oaths, receive evidence, hold appropriate conferences before or during hearings, rule upon all objections or motions, receive offers of proof, fix the time for the filing of submittals, dispose of any other matter that normally and properly arises in the course of a hearing, and take all other actions authorized by law that are deemed necessary to the orderly and just conduct of a hearing.

1-6-2 Parties. The Planning Department, admitted intervenors and the petitioner shall in every case be parties to such proceedings.

1-6-3 Continuance. The Presiding Officer may, for good cause, postpone or continue any hearing from day to day, or to a later date, or to a different place without notice other than the announcement thereof at the Agency Hearing when an applicant for a Special Management Area, Class IV, Use, Variance Permit, or Special Permit submits significant data, reports or studies at the time of the hearing, in order to give the Commission and the public an opportunity to evaluate and consider the data, reports or studies.

1-6-4 Ex Parte Communication. No person whether or not a party to a Proceeding before the Commission shall communicate ex parte regarding any subject matter of the proceeding with any member of the Commission or Hearing Officer who will be a participant in the decision-making process.

#### 1-6-5 Notice of Agency Hearing.

(a) The notice of Agency Hearing will be served upon all Parties and persons on the mailing list for this purpose at their last recorded address at least fifteen (15) days prior to the Agency Hearing date, unless otherwise provided by law. Further, the notice will be filed at least six (6) days prior to the Agency Hearing with the Office of the County Clerk.

(b) The notice shall contain the appropriate information as required in Chapter 91, HRS.

1-6-6 Waiver of Procedure. Any procedure in a Contested Case may be modified or waived by stipulation of the Parties and informal disposition may be made of any Contested Case by stipulation, settlement, agreement, consent order, or default.

1-6-7 Prehearing Conference. A Presiding Officer or designated representative may hold a prehearing conference with the Parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed written testimony, setting of

schedules, exchanging names of witnesses, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the Proceeding.

1-6-6 Requests for Transcripts. Any Party may request transcripts according to the provisions set forth in Section 1-2-6 (b). Requests shall be made in writing at least seven (7) days prior to the Agency Hearing.

1-6-9 ~~Limiting Testimony~~ Just, expeditious, and inexpensive determination.

(a) To avoid unnecessary cumulative evidence, the Presiding Officer may limit the number of witnesses or the time for testimony upon a particular issue.

(b) The Presiding Officer shall not order or approve civil style discovery against non-parties; and unless stipulated to by all parties, the hearings officer shall not order or approve civil style discovery between parties. Civil style discovery refers to procedures initiated by parties under judicial rules of civil procedure, specifically including but not limited to, depositions on oral or written questions, written interrogatories, requests for production of documents or things, requests to enter land or other property, physical and mental examinations, and requests for admissions.

1-6-10 Stipulation as to Findings of Facts, Conclusions of Law. Nothing in these rules shall prohibit Parties from entering into appropriate stipulations as to findings of fact, conclusions of law, and conditions, if any, concerning the subject petition.

- (1) A Petitioner who desires to enter into a stipulation shall prepare a stipulation as to any or all findings of fact, conclusions of law, and conditions, if any, concerning the subject petition.
- (2) All Parties shall sign the proposed stipulation as to any or all proposed findings of fact, conclusions of law, and conditions, and proposed decision and order, if at all, and shall submit such stipulation to the Commission seven (7) days prior to the Agency Hearing date, unless otherwise permitted by the Presiding Officer.
- (3) The Commission may require the parties to submit additional evidence concerning the stipulation and proposed decision and order.
- (4) The Commission may approve the proposed decision and order by amending or adopting the proposed decision and order.

1-6-11 Order of Agency Hearing Procedure. At the commencement of the Agency Hearing, the Presiding Officer may read the notice of hearing and then briefly outline the procedures to be followed, which shall be in the following manner:

(a) Entertain Requests for Intervention. All persons seeking to intervene as Parties shall be asked to identify themselves and their counsel. The Presiding Officer shall proceed

in accordance with Chapter 4 herein.

~~[(b) Presentation of Evidence. The Department shall first present evidence and shall be subject to questioning by all Parties and the Commission. The Petitioner may then make a presentation and be subject to questioning by all Parties and the Commission. In cases where intervention is allowed and a timetable for evidentiary Proceedings for the parties has been established, any questioning by the Parties and the Commission may be suspended until such time as designated by the Presiding Officer.]~~

(b) Order of Presentation. The Petitioner's presentation shall be first, followed by the Department and then the intervenors. In cases where there multiple Intervenors, the Presiding Officer shall establish the order of the Intervenors' presentations.

(c) Public Testimony. The presiding officer shall then suspend the rules and open the Agency Hearing to the public as required by law. Cross-examination of public witnesses shall not be allowed of the Petitioner and Intervenors.

(d) Close Public Testimony. Upon the admission of all public evidence, the Presiding officer shall close the public testimony portion of the Agency Hearing.

(e) Additional Testimony. The Presiding Officer shall allow the submission of additional written evidence from public witnesses up to seven (7) days after the close of the Agency Hearing in cases where the Commission does not take action on the same day.

(f) Request To Submit Proposed Findings of Fact, Conclusions of Law, Decision And Order When There Is No Intervention. In cases when there is no intervention, the Petitioner may, after the evidentiary portion but prior to the decision-making portion of the Meeting (when a duly-made motion by the Commission to act on the docket is made), request the opportunity to submit a proposed Findings of Fact, Conclusions of Law, Decision of Law. Should the Petitioner not submit a request at such time, the Petitioner's right to submit such document shall be deemed waived and the Commission may commence with appropriate decision-making action. If a request is made, the Presiding Officer may continue the docket and set a timetable for the conduct of the post-hearing Proceedings pursuant to Section 1-6-18.

(g) Reconvening of Contested Case Hearing Portion. In cases where there are Intervenors or adverse Parties and a Contested Case Hearing is reconvened to complete the presentation of evidence, the Presiding Officer may explain the Proceedings, note and discuss objections to the Proceedings from each Party, if any are submitted, and then administer the oath to witnesses.

~~[(h) Order of Presentation. The Petitioner's presentation shall be first, followed by the Department and then the intervenors. In cases where there multiple Intervenors, the Presiding Officer shall establish the order of the Intervenors' presentations.]~~

(h) Cross-Examination. Each Party shall have the right to conduct such cross-

examination of other Parties and their witnesses as may be required for a full and true disclosure of the facts. The order of cross-examination and re-cross shall be determined by the Presiding Officer. The Commission shall have the right to question each Party after completion of re-cross by the other Parties.

(i) Rebuttal Evidence. Each Party shall be afforded the opportunity for rebuttal in the same order as item 1-6-11 (h) above.

(j) Close Contested Case Hearing. Upon completion of all testimony and evidence submitted by each party and their witnesses, the Presiding Officer shall close the Contested Case portion of the Hearing.

1-6-12 Co-Counsel. No more than two (2) counsels may appear for any Party at any Proceeding before the Commission. Where a Party is represented by more than one counsel, only one of the counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments.

1-6-13 Requests For Subpoenas.

(a) Subpoenas of Witnesses. Requests for the issuance of subpoenas requiring the attendance of a witness for the purpose of taking oral testimony before the Commission shall be in writing, and shall state the reasons why the testimony or the witness is believed to be material and relevant to the issues involved. Only Parties or a Commissioner may request the issuance of a subpoena.

(b) Every subpoena shall state the title of the proceeding for which it is to be issued, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(c) Subpoenas Duces Tecum. Requests for the issuance of subpoenas for the production of documents or records shall be in writing; shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved.

(d) Who May Issue Subpoenas. Subpoenas may be issued by the Chair or in his absence, any Commissioner. No subpoena shall be issued unless the Party requesting the subpoena has complied with the provisions herein and gives the name and address of the desired witness. Signed and sealed blank subpoenas will not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall show at whose instance the subpoena is issued. The Parties at whose instance a subpoena is issued shall arrange for service thereof, and shall file a return and acknowledgment or service thereon.

(e) Fees and Mileage. Witnesses summoned shall be paid the same fee and mileage as are paid witnesses in Circuit Courts of the State of Hawai'i and such fees and mileage shall be paid by the Party at whose instance the witness appear.

(f) Oath. Witnesses shall be sworn under oath or affirmation prior to testifying.

1-6-14 Consolidation. The Commission, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider, two or more Proceedings which involve substantially the same parties or issues which are the same or closely related if it finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the Proceedings.

1-6-15 Substitution of Parties. Upon motion and for good cause shown, the Commission may order substitution of Parties, except that in the case of death of a Party, substitution may be ordered without the filing of a motion.

1-6-16 Motions.

~~[(a)Timing-~~

- ~~(1) — Motions Prior to the Start of the Contested Case Hearing. A motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be filed with the Commission and served on the opposing Party fourteen (14) calendar days before the first day of the Contested Case hearing.~~
- ~~(2) — Motions After the Start of the Contested Case Hearing. Motions may be filed following the start of a Contested Case hearing if the factual basis for the motion arises during the course of the Contested Case hearing. Motions made after a Hearing has started shall be made at least fourteen (14) days prior to the date set for final argument on the matter.~~
- ~~(3) — Motions that fail to meet the requirements set forth in this rule shall be deemed waived unless good cause is shown.~~

~~(b) Form and Contents. All motions shall be made in writing to the Commission or Hearing Officer, and shall state the relief sought and shall be accompanied by an affidavit or legal memorandum setting forth the grounds upon which they are based. For good cause shown the Commission may allow oral motions to be made during a Contested Case hearing.~~

~~(c) Service of Motions. The moving party shall serve a copy of all motions on all other Parties and shall file with the Commission the original with proof of service.~~

~~(d) Memorandum in Opposition. A memorandum in opposition or counter affidavit shall be served on all Parties and the original and proof of service shall be filed with the Commission within seven (7) days after being served with motion. The Presiding Officer may order the memorandum in opposition to be filed earlier than the seven (7) day period. The Commission, for good cause shown, may continue the Hearing until the next meeting in order to give the Commission an opportunity to evaluate and consider the motion and memorandum in opposition to the motion.~~

~~(e) Waiver. Failure to serve or file a memorandum in opposition to a motion or failure to appear at the Hearing may be deemed a waiver of objection to the granting or denial of the motion. A Party who does not oppose the motion shall notify the Presiding Officer and opposing counsel or Party promptly.]~~

(a) All motions, other than those made during a hearing, shall be made in writing to the Presiding Officer, shall state the relief sought, and shall be accompanied by an affidavit, declaration, and/or memorandum setting forth the grounds upon which they are based.

(b) All motions are non-hearing and shall be decided upon written submission, unless the Presiding Officer elects to set a time for hearing.

(c) Unless otherwise specified by the Presiding Officer, a memorandum in opposition or a counter affidavit or declaration may be filed and served on all parties no later than fifteen (15) days after service of the motion.

(d) No reply or supplemental memoranda shall be filed unless specifically allowed by the Presiding Officer.

(e) The original documents and proof of service shall be filed with the commission. When service is made by mail, two calendar days shall be added to the periods required in subsections (c).

(f) Unless otherwise specified by the Presiding Officer, all pretrial motions shall be filed no later than twenty (20) days prior to the assigned contested case hearing date.

#### 1-6-17 Evidence.

(a) Form and Admissibility. The Commission shall not be bound by the Hawai'i Rules of Evidence relating to the admission or rejection of evidence, but may exercise its own discretion in such matter with a view towards insuring that justice is served.

(b) Burden of Proof. Except as otherwise provided by law, the Party initiating Commission consideration shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

(c) Exclusion of Irrelevant Material. As a matter of policy, the Commission shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(d) Ruling. The Presiding Officer shall rule on the admissibility of all evidence. Such ruling may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote justice, the Presiding Officer may refer the matter to the Commission for determination.

(e) Objections and Exceptions. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(f) Offer of Proof. An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

(g) Prepared Testimony. With the approval of the Presiding Officer, a witness may read into the record his testimony on direct examination. Before any prepared testimony is read, unless excused by the Presiding Officer, the witness shall deliver copies thereof to the Presiding Officer, the clerk reporter, and all counsel or Parties. Admissibility shall be subject to the rules governing oral testimony. If the Presiding Officer deems that substantial saving in time will result, a copy of the prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all Parties and the Commission to permit proper cross-examination of the witness on matters contained in said prepared testimony.

(h) Documentary Evidence. If relevant and material matter offered in evidence is embraced in a document containing other matters, the Party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the Presiding Officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded opportunity to examine the document, and to offer in evidence other portions thereof believed material and relevant.

(i) Exhibits.

- (1) Form-Size. Exhibits shall be clearly and permanently legible and in such form as may be prescribed by the Commission. Exhibits shall be bound or folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular Form.
- (2) Copies. When exhibits are offered in evidence, and when practicable the original and twelve (12) copies shall be furnished to the Presiding Officer with a copy to each Party to the Proceeding other than the Commission, unless such copies have been previously furnished or the Presiding Officer otherwise.

(j) Commission Records. The file kept by the Department on the matter pending before the Commission shall constitute evidence for the purposes of an Agency Hearing.

(k) Official Notice of Facts. Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawai'i. Official notice may also be taken of generally recognized technical or scientific facts within the Commission's specialized knowledge when Parties and given notice either before or during the hearing or the material so noticed and afforded the opportunity to contest the facts so noticed.

(1) Additional Evidence. No supplemental evidence shall be accepted into the record after the Agency Hearing is closed. However, the Presiding Officer may, at the hearing, require the production of further evidence upon any issue. Upon agreement of the Parties, the Presiding Officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission reserving exhibit number therefor.

1-6-18 Post Hearing Procedures for Hearing Conducted By Commission.

(a) Correction of Transcripts in Cases where Transcripts are Provided. Motions to correct a transcript shall be filed with the Commission within fourteen (14) days after receipt of the transcript unless otherwise directed by the Presiding Officer, and shall be served on all Parties. Motions to correct transcripts shall certify the date when the transcript was received. Any objections to proposed corrections must be served on all Parties and received by the Commission at least seven (7) days after the date of service of the corrections. If no objections are received, the transcript will, upon approval of the Commission, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration to the stenographic transcript of the hearing.

(b) Submittals of Proposed Decisions and Orders. Each Party to the proceeding may submit a proposed decision and order to the Commission which shall include findings of fact and conclusions of law. Said proposals shall be served to each Party to the proceeding.

(c) Timing of Submittals. Unless otherwise directed by the Presiding Officer, in proceedings where transcripts are not required, submittal of a proposed decision and order shall be made within thirty (30) days from the date of closing of the hearing. In proceedings whereby transcripts are required, submittal shall be made within fourteen (14) days from the date of service of the transcript.

(d) Submittal of Exceptions to Decision and Order. Submittal to the Commission of exceptions to a proposed decision and order shall be made within seven (7) days from the date of service of said proposed decision and order, or within such period of time specified by the Presiding Officer. Such submittal shall be served on all parties.

(e) Final Arguments. The Presiding Officer shall establish the date for presentation of final arguments which shall occur in the following order, unless otherwise directed by the Presiding Officer:

- (1) Entertainment of submitted motions, exceptions or corrections to the transcript, if any, by the Commission;
- (2) Presentation of oral arguments by the Petitioner, Department, then Intervenor. In cases where there are multiple Intervenors, the Presiding Officer shall determine their order of presentation.
- (3) Closing arguments or rebuttal by the Petitioner.



The Presiding Officer may set appropriate time limitations for oral argument provided that not more than one (1) hour on each side of the Proceeding will be allowed for argument without special leave of the Commission.

(f) Issuance of Decision and Order. A Proceeding shall stand submitted for decision by the Commission after the taking of evidence and the presentation of such oral argument as may have been prescribed by the Presiding Officer. The Commission may:

- (1) Adopt a decision and order as submitted by any of the Parties, with or without revisions;
- (2) Take action on the matter and may require the Department or a Party to the proceeding to submit a written decision and order which conforms with the evidence; or
- (3) If no proposed findings of fact, conclusions of law, decision and order have been submitted by any party, take action on the matter and require the Director to notify the Parties.

(g) Service of Decisions. Decisions shall be served in writing by the Director by mailing copies thereof (return receipt) to the Parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a copy thereof. When a party to a Proceeding has appeared by a representative, service upon such representative or counsel shall be deemed to be service upon the Party.

(h) Withdrawal of Application. In cases where an application is withdrawn by the Petitioner after an adverse decision is rendered by the Commission and prior to the ratification or effective date of such final decision and order, the application or substantially similar application shall not be resubmitted sooner than one (1) year following the withdrawal.

(i) Appeals. Any Party aggrieved by a final order and decision of the Planning Commission may obtain Judicial reviews thereof in the manner pursuant to Chapter 91, HRS.

#### 1-6-19 Post Agency Hearing Procedures for Hearing Conducted by Hearing Officer.

(a) Recommendation of Hearing Officer:

- (1) Upon completion of taking of the evidence, the Hearing Officer shall prepare a report setting for the proposed findings of fact, conclusions of law, the reasons therefore, and a recommended order, and shall submit the report of the Proceeding to the Commission.
- (2) The record shall include the petition, notice of hearing, motions,

rulings, orders, transcript of the hearing, if required, documentary evidence, stipulations, proposed findings, or other documents submitted by the Parties, objections to the conduct of the hearing and the report of the Hearing Officer and all other matters placed in evidence.

- (3) The Hearing Officer shall cause a copy of the report to be served upon all Parties to the Proceedings.

(b) Exception to Hearing Officer's Report and Recommendations.

- (1) Prior to seven (7) working days after service of the report and recommendations by the Hearing Officer, a Party may file with the Commission, exceptions to the report. Such Party shall serve copies of exceptions upon each party to the Proceeding.
- (2) The exceptions shall:
  - (i) Set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken;
  - (ii) Identify that part of the Hearing Officer's report and recommended order to which objections are made;
  - (iii) Designate by page citation to the portions of the record relied upon;
  - (iv) State all the grounds for exceptions to a ruling, finding, conclusion or recommendation. The grounds not cited or specifically urged are waived.

(c) Support of Hearing Officer's Report and Recommendations.

- (1) Prior to seven (7) working days after service of the exceptions taken to the Hearing Officer's report, any other Party may file with the Commission arguments in support of the Hearing Officer's recommendations. Such Party shall serve copies upon each party to the Proceeding.
- (2) The submittal shall:
  - (i) Answer specifically the points of procedure, fact, law or policy to which exceptions were taken;
  - (ii) State the facts and reasons why the report and recommendations must be affirmed; and
  - (iii) Designate by page citation the portions of the record relied upon.

(d) Oral Argument Before the Commission.

- (1) If a Party desires to argue orally before the Commission, a written request with reasons therefore shall accompany the exceptions filed. The Commission may grant the request.
- (2) The Commission may direct oral argument on its own motion.

(e) Commission Action.

- (1) In the event no statement of exceptions is filed, the Commission may proceed to reverse, modify, or adopt the recommendations of the Hearing Officer.
- (2) Upon the filing of the exceptions and support documents, the Commission may:
  - (i) Render its decision upon the record;
  - (ii) If oral argument has been allowed, the Commission may render its decision after oral argument; or
  - (iii) Reopen the docket and take further evidence or may take such other disposition of the case that is necessary under the circumstances.